

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 10-0084

BRADLEY HOWARD/HOWARD FAMILY 1995 TRUST,

Appellant and Third-Party Respondent,

v.

SHELLY WEIDOW,

Appellee and Petitioner,

v.

UNINSURED EMPLOYERS' FUND,

Appellee and Respondent/Third-Party Petitioner.

FILED

APR 09 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

RESPONSE TO OBJECTION TO CORRECTED NOTICE OF APPEAL

On Appeal from the Montana Workers' Compensation Court,
the Honorable James Jeremiah Shea
Cause No. WCC No. 2007-1863

G. Andrew Adamek
(andy@bkbh.com)
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
P.O. Box 1697
Helena, MT 59624-1697
(406) 443-6820
Attorneys for Appellant and Third-Party Respondent

INTRODUCTION

Appellant Bradley Howard/Howard Family 1995 Trust (hereafter collectively referred to as "Howard") stands by its Corrected Notice of Appeal by reasserting that this appeal is not an appeal from an order certified as final under M. R. Civ. P. 54(b). Certification under M.R. Civ. P. 54(b) is not necessary because this Court has jurisdiction to hear this appeal under M.R. App. P. Rule 6. In its Order on appeal the Workers' Compensation Court (hereafter "WCC") stated, in part:

¶106 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as notice of entry of judgment.

See Findings of Fact, Conclusions of Law and Judgment dated 1/22/10 ("Order") at page 34.

This Order resolved all issues pending in the underlying cause before the WCC. Appellee Shelly Weidow (hereafter "Weidow") should not be allowed to reargue speculative entitlement to every conceivable class of benefit or the amount of benefit afforded under the Workers' Compensation Act that was not addressed in the underlying cause, to avoid appellate jurisdiction of this Court. If this is permitted, then every workers' compensation appeal brought to this Court that did not address each and every class of benefit entitlement potentially payable in the underlying claim, would never be ripe for appeal.

ARGUMENT

The Order was Properly Appealed under M.R. App. P. Rule 6.

The requirements of M.R. App. P. Rule 6 have been met and this matter should not be remanded to the WCC for further findings. Rule 6 provides appeal of a final judgment from an order that is the court's final decision on the referenced cause. See Rule 6 (1). It is clear from review of the Order on appeal that the WCC addressed each matter as raised and set forth by the parties in the pretrial order. Weidow's right to certain benefit classes as set forth in the pretrial order was presented to the WCC for ruling and it ruled. However, the actual amount or level of each benefit class then payable, or in the future, was not presented to the WCC for ruling. This omission is not fatal to Howard's appeal.

The issues before the WCC as outlined in the final pretrial order filed and dated May 4, 2009 were ruled upon, and are generally described below as whether:

1. Howard was an uninsured employer for workers' compensation purposes;
2. Weidow was an employee for workers' compensation purposes;
3. Weidow's employment was casual;
4. Weidow was entitled to workers' compensation benefits under Sections 701-704;
5. Weidow timely filed his Petition for Hearing; and
6. Howard must indemnify UEF for benefits payable to Weidow.

See Final Pretrial Order dated 5/04/09 and Minute Book Hearing No. 459 at Docket Nos. 91 and 92, respectively.

A review of the Order on appeal reveals that the WCC did consider each issue presented in the final pretrial order and as amended, and made a final determination for purposes of appeal, as follows:

1. That Howard was an uninsured employer (see Order at ¶ 87 and ¶100 and ¶102);
2. That Weidow was an employee for workers' compensation purposes and not casually employed when he was injured (see Order at ¶92-96, ¶103);
3. That Weidow's employment was not casual (see Order at ¶92-96, ¶103);
4. Weidow is entitled to medical benefits under Section 704, but has not proven entitlement to wage loss benefits under Section 701 at this time (see Order at ¶88 -90, ¶101);
5. That Weidow timely filed his Petition for Hearing (see Order at ¶97); and
6. That Howard must indemnify the UEF (see Order at ¶98 -99, ¶105).

Thus, the WCC was asked to and did address the right of certain benefit entitlements, and not the actual level or amount of benefit entitlement. It was not asked to address every other conceivable benefit entitlement that may be payable over the life of the underlying claim.

***Satterlee* as applied to Rule 54 (b) is Not Controlling in this Appeal.**

In *Satterlee v. Lumberman's Mut. Cas. Co.*, 2007 MT 325, 340 Mont 176, 178 p.3d 689, this Court was asked to entertain appeal of a partial summary judgment order finding the provisions of MCA 39-71-710 constitutional on the basis of equal protection analysis. *Id.* at 340 Mont, 176, 177. In determining the issue of whether the WCC erred in certifying as final its order on the partial summary judgment, this Court in *Satterlee* noted that additional constitutional challenges as pled in the underlying cause were not ruled upon in the order,

including impermissible delegation of legislative power, substantive due process and age discrimination. *Id.* at Mont. 176, 181. Accordingly, this Court ruled that the WCC's certification under M.R. Civ. P. Rule 54 (b) was inappropriate because the order fell short of a final judgment on each of the constitutional challenges. *Id.* at Mont. 176, 182. The order did not resolve the remaining challenges.

The circumstances of the present appeal are distinguishable from *Satterlee*. *Satterlee* clearly addressed an interlocutory appeal of a partial summary judgment ruling. There were remaining constitutional challenges that had not been addressed in the partial summary judgment ruling. Those challenges were not addressed or ruled upon and therefore interlocutory appeal was not appropriate. In the present appeal, the record clearly indicates the WCC addressed each of the issues presented by the parties for adjudication in the pretrial order. The WCC ruled on each of the issues, essentially finding Weidow was not casually employed and therefore sustained a compensable injury, was entitled to medical benefits, but had not established his entitlement to wage loss benefits or other potentially payable benefits as of the time of the ruling. Thus, there were no outstanding or remaining issues presented to the WCC that it did not rule on.

Weidow's right to benefit entitlement under the Workers' Compensation Act if he prevails on appeal is certain. The uncertainty which remains as to the amount of benefit entitlement for each class as well as his future entitlement to other

classes of benefits not addressed in the Order, should not prevent Howard from appealing as final, the judgment and Order issued by the WCC under Rule 6. The WCC addressed all issues presented to it for determination by all the parties.

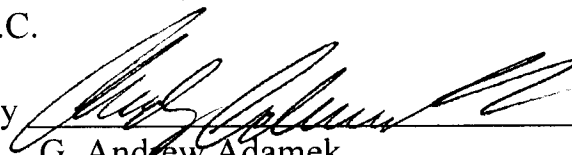
Weidow's argument that Howard is attempting to delay his speedy return to work by challenging his present entitlements with appeal ignores the salient fact that Weidow is really seeking a second chance to present his right to all entitlements under the Workers' Compensation Act. But a determination of all entitlements under the Workers' Compensation Act was not sought by Weidow in the cause or Order on appeal. In the event future disputes arise over benefit right or other class entitlement, the WCC would retain jurisdiction to hear such disputes. See MCA 39-71-2905. This continuing jurisdiction and right of redress is necessary, given that certain classes of benefits are payable under the Workers' Compensation Act at different times over the life of any given claim.

Howard respectfully requests this Court accept this cause on appeal under Rule 6.

Dated this 9th day of April, 2010.

BROWNING, KALECZYC, BERRY & HOVEN,
P.C.

By



G. Andrew Adamek
Attorney for Appellant Howard

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of April, 2010, I mailed a true and correct copy of the above and fore going RESPONSE TO OBJECTION TO CORRECTED NOTICE OF APPEAL, by the United States Postal Services, postage prepaid, addressed to the following counsel of record:

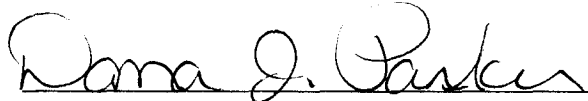
Joseph Nevin
Special Assistant Attorney General
Montana Department of Labor and Industry
P.O. Box 1728
Helena, MT 59624-1728

Jonathan McDonald
Dix, Hunt and McDonald
310 Broadway
Helena, MT 59601


BROWNING, KALECZYC, BERRY & HOVEN,
P.C.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that the Response to Objection to Corrected Notice of Appeal, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 1,138 words.


BROWNING, KALECZYC, BERRY & HOVEN,
P.C.